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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

NATHAN KEVIN TURNER, Plaintiff, v. BONNIE DUMANIS, District Attorney of the County of San Diego; SAN DIEGO POLICE DEPT.; DETECTIVE A. FRAGOSO of the San Diego County Police Dept.; DETECTIVE J. DREIS of the San Diego County Police Dept.; SAN DIEGO CRIME LAB; and THE ATTORNEY GENERAL OF STATE OF CALIF., Defendants.	No. 08-cv-0360-W(RBB) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CONSTITUTIONAL CLAIM Date: July 28, 2008 Dept.: 7 - Courtroom of the Honorable Thomas Whelan Trial Date: None **[NO ORAL ARGUMENT PURSUANT TO LOCAL RULE 7.1d1]**

I

INTRODUCTION

Defendant District Attorney Bonnie Dumanis moves to dismiss prisoner-plaintiff Nathan Kevin Turner's complaint. Plaintiff seeks equitable relief for DNA testing of biological evidence, and for a determination that if such evidence does not exist, it was destroyed in bad faith. In principle the District Attorney is not opposed to DNA testing, but in this case, plaintiff's affirmative allegations show that he cannot prevail.

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II

STANDARD FOR DISMISSAL UNDER RULE 12(b)(6)

A motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure, rule 12(b)(6), tests the legal sufficiency of the complaint. A claim can only be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making this determination, the Court must accept as true all material allegations in the complaint, and draw all reasonable inferences in the plaintiff's favor. *Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the Court does not need to accept as true conclusory allegations or unreasonable inferences. *Transphase Systems, Inc. v. So. California Edison*, 839 F.Supp. 711, 718 (C.D.Cal. 1993).

III

FACTUAL ALLEGATIONS IN COMPLAINT

The complaint alleges that plaintiff has been "denied repeatedly and for years Post-Conviction discovery, a fundamental right to due process and equal protection." (Complaint, ¶ 1.) (Subsequent references are to the paragraph numbers in plaintiff's complaint.)

Allegedly plaintiff is the "perfect candidate for Post-Coviction [sic] discovery DNA testing." (¶ 2.) Allegedly such testing would not require his release, nor would it "invalidate his outstanding criminal judgment." (¶ 3.)

Allegedly defendant District Attorney Bonnie Dumanis "willingly refuses" plaintiff's "request for the production of evidence," and plaintiff only seeks to "prove or disprove validity of the held DNA evidence, or if the biological evidence was destroyed 'illegally' and in 'Bad Faith." (¶ 4.) Allegedly plaintiff can demonstrate that defendant "has denied plaintiff access to this DNA biological evidence, i.e, deliberatly [sic] blocked his access to the evidence in order to impede his ability to take advantage of available Post-Conviction legal procedures." (¶ 5.)

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Allegedly plaintiff was sentenced to state prison for 174 years and 4 months. Allegedly he is innocent of "any crimes of robbery, rape, burglary and peeping against all victims." (¶ 16.) Allegedly "during the trial, the biological evidence, that is, 'all' the semen samples taken directly from the victims multiple slides, e.g., vaginal smears, mouth, smears, and tampon, completely and irrefutably exonerates plaintiff from these crimes as several victims DNA samples did not match plaintiff's or were inconclusive." (¶ 17.)

Allegedly "the San Diego Police Department crime lab informed the prosecution of the County of San Diego that all pieces of evidence of biological revealed blood type 'A' and 'B' which is contrary to plaintiff's which is blood type 'O'. When this became known to prosecution, plaintiff was offered (75) seventy five years to plead to all counts." (¶ 19.)

Allegedly, in order to get a conviction, the prosecution introduced a false confession and inconclusive evidence. (¶ 20.) Plaintiff was convicted on March 22, 1982, his direct appeal failed on August 26, 1983, and the evidence in possession of the trial court was destroyed on February 22, 1987. (¶ 25.) Biological evidence was destroyed on August 18, 1987. (¶68.)

Allegedly plaintiff unsuccessfully appealed but "being untrained in the law he did not know how to present this issue." Allegedly his conviction was affirmed on March 30, 1983. Thereafter, plaintiff allegedly had litigation ongoing "until the AFDPA of 1996." Allegedly evidence must be preserved pending litigation. "Especially evidence that's the center of dispute." (¶ 24.)

Allegedly plaintiff's "direct appeal was lost in August 26, 1983." The Superior Court issued an order " to destroy or release trial exhibits" on August 6, 1987, and the order was "apparently sent" to plaintiff's trial attorney. Allegedly plaintiff does not know if he or his appellate attorney petitioned the California Supreme Court. Allegedly the evidence in the trial court's possession "was destroyed or otherwise disposed of in February 22, 1987. In violation of procedural due process." (¶ 25.)

Allegedly plaintiff brought multiple federal *habeas* and related proceedings between 1985 and 2007. (¶¶ 28-35, 54.) Allegedly plaintiff also brought multiple state *habeas* and related proceedings between 1997 and 2007. (¶¶ 38-40, 46, 51, 55-57.) Allegedly as plaintiff "continued to challenge his conviction, collterally [sic] he contacted the Innocent Project at Cardoza (sic) School of Law," and the District Attorney's "DNA Project" provided "all the destruction orders for this case." (¶ 42.)

Allegedly on December 4, 2002, plaintiff "motioned the Superior Court" for DNA testing, for appointment of counsel, and for a new trial. (¶ 43.) Allegedly on September 2, 2003, plaintiff was informed that a Deputy Public Defender "was assigned to assist plaintiff in the location and preservation of DNA evidence." Allegedly it was discovered that all evidence that was presented at plaintiff's trial was destroyed after his conviction was affirmed, and "other physiological evidence where [sic] released to the victims soon after the trial was over. Allegedly the hospitals that examined the rape victims had turned over all their evidence to law enforcement. (¶ 44.)

Allegedly on February 13, 2004, the Deputy Public Defender assigned to assist plaintiff informed him that DNA testing could not be done "because all the evidence is gone." (¶45.) Allegedly on August 3, 2005, the Superior Court confirmed "the total destruction of evidence." (¶50.)

Allegedly in the year 2000, California enacted Penal Code section 1405 allowing persons convicted of felonies to move in trial court for DNA testing, due to "an enormous amount of prisoners found completely innocent after under going DNA testing." (¶ 58-59.) Allegedly plaintiff "found out about P.C. § 1405 in 2002," and "counsel was appointed on or about March 20, 2003." (¶ 61.) Allegedly appointed counsel "continuously put plaintiff off about answering questions regarding the evidence in question of locating the evidence." (¶ 62.)

Allegedly plaintiff asked the Superior Court to replace appointed counsel "with experienced DNA counsel who would effectively litigate plaintiff's case." (¶ 62.) Allegedly that request was denied, and appointed counsel informed plaintiff that a

Superior Court hearing had been scheduled, and that all the "evidence had indeed been destroyed." (¶ 63, 66.)

Allegedly on February 13, 2004, appointed counsel wrote plaintiff that she was "looking into the timing and circumstances of the destruction of evidence to determine if there is any relief to you for illegal destruction of evidence." (¶ 67.) Allegedly the evidence was destroyed in 1987, which was four years after the San Diego Police Department "checked and specifically determined" that plaintiff had pending post-conviction litigation." (¶ 68.)

Allegedly on March 17, 2005, appointed counsel "for no apparent reason whatsoever, attorney completely abandoned the possible illegal destruction of evidence investigation." (¶ 69.) Allegedly the "Police authorities of San Diego County" knew that plaintiff did not commit rape, and had the evidence destroyed so he could not prove his innocence, in bad faith "to hide the true exculpatory results." (¶ 72.) Allegedly plaintiff's rights have been violated by denying that DNA evidence exists. (¶74.) The District Attorney's refusal to reveal if the evidence still exists 25 years later is "bad faith." (¶ 96.)

Plaintiff prays for a "search" for DNA biological evidence. (Prayer ¶ 1.) Plaintiff also prays for appointment of counsel to search for DNA evidence. (Prayer ¶ 2.) Plaintiff prays for an "injunction" stating that his constitutional rights have been violated, for an "investigation" into evidence destruction, for "unlimited access to all files," and for "testing by a renowned lab" if evidence is extant. (Prayer ¶¶ 3-8.)

IV

ARGUMENT

In *Osborne v. District Attorney's Office*, 521 F.3d 1118 (9th Cir. 2008), the court affirmed a judgment that, "under the unique and specific facts of this case and *assuming the availability of the evidence in question*," the plaintiff had a limited due process right to access to material evidence for post-conviction DNA testing. Further, "materiality

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would be established by a *reasonable probability* that Osborne could 'affirmatively prove that he is probably innocent.'" *Ibid*. at 1122, 1134. (Emphasis added.)

The present plaintiff affirmatively alleges that he was informed by the District Attorney's "DNA Project" (¶ 42) and by others (¶¶ 25, 45, 50, 66, 68, 72) that the evidence in question no longer exists. In other words, the "availability of the evidence in question" cannot be assumed under plaintiff's affirmative allegations. *Osborne v. District Attorney's Office*, 521 F.3d at 1122. Plaintiff cannot show materiality, because he affirmatively alleges that blood types disclosed on the evidence were inconsistent with his blood type. (¶ 19.) In other words, plaintiff's affirmative allegations show no reasonable probability that DNA testing (even if the evidence still existed) could affirmatively prove that he is actually innocent. *Ibid*. at 1134.

Plaintiff's alternative claim for a finding that evidence was destroyed in bad faith is not the sort of relief that can be granted under *Osborne*, or recognized as a due process claim under California Penal Code section 1405. The *Osborne* opinion carefully explained that only a limited right for DNA testing of existing evidence was being recognized. *Osborne v. District Attorney's Office*, 521 F.3d at 1122. Even if section 1405 were found to create a liberty interest in preservation of certain evidence for DNA testing, it was first enacted thirteen years after the evidence was allegedly destroyed in this case, and a liberty interest created by a statute obviously cannot predate the initial enactment of the statute.

V

CONCLUSION

Scientifically re-testing evidence can serve two worthy purposes; it can free innocent prisoners, and it can help get true offenders off the street and bring them to justice. Even assuming, however, that evidence in plaintiff's case had not been destroyed twenty-one years ago, plaintiff still could not justify re-testing, because he affirmatively alleges that blood typing has already disclosed an incompatible blood type on the

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evidence. Plaintiff's affirmative allegations put this case outside the reach of the *Osborne* opinion, so plaintiff has stated no actionable claim for the relief he seeks.

The San Diego District Attorney has been a leader in DNA re-testing, as suggested by the July 28, 2000 article from the New York Times lodged herewith as Exhibit "A." This motion is not based on unwillingness to acknowledge scientific progress, but on plaintiff's affirmative allegations showing why he cannot state an actionable constitutional claim.

DATED: June 20, 2008

Respectfully submitted,

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